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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1057

FEDERAL TRADE COMMISSION,
Petitioner,

v.

AMERICAN MOTORS CORPORATION AND
AMERICAN MOTORS SALES
CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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American Motors Corporation and American Motors Sales Corporation[1] herewith oppose the Solicitor General's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on September 29, 1967.

[1] American Motors Corporation and American Motors Sales Corporation are referred to herein as "Respondent" or "AMC."

OPINIONS BELOW

The decision of the Federal Trade Commission Hearing Examiner in this case appears at pages 57a through 71a of the printed appendix below. (P.A. 57a-71a)[2]

QUESTIONS PRESENTED[3]

Whether the Court of Appeals for the Sixth Circuit correctly concluded that Respondent's "regular dealer" customers possessed sufficient "selfsameness," within the meaning of this Court's opinion in *U.S. v. Borden,* so as to justify their treatment as a group for cost justification purposes.

STATEMENT

During 1956 and 1957 (the periods referred to in the complaint), and continuing until the introduction of the 1960 line of electric appliances, the discounts to merchandising distributors were 3.38% on appliances other than laundry equipment, and 4.32% on laundry equipment (P.A. 16a, 42a, 43a, 47a). In the fall of 1959, when the 1960 line of laundry equipment was announced, the discount on laundry equipment was reduced to 3.38% (P.A. 35a, 36a).

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[2] Respondent has adopted the references to appendices utilized by Petitioner. "App." refers to the appendix to the Petition herein; "P.A." refers to the printed appendix below.

[3] In the event that the writ requested by Petitioner should be granted, Respondent will also argue, in support of the judgment below, that the Court below improperly found the requisite injury to competition.

In February of 1959, within a few weeks after the Commission's complaint was filed, Respondent retained William J. Warmack, a certified public accountant, to advise with respect to the development of a cost justification defense (P.A. 11a). Mr. Warmack had been employed by the Commission from 1929 to 1946, and primarily he had been engaged on cost work in connection with the Commission's administration of the Robinson-Patman Act. From 1946 until his death, Mr. Warmack was in private practice as a cost consultant and specialist on Robinson-Patman matters, and during this period he was connected with a number of cases before the Commission involving price discrimination (P.A. 10a, 11a). Mr. Warmack's training, background and experience eminently qualified him as an expert on cost and price discrimination matters (P.A. 61a, 71a).

The methods and procedures employed by Mr. Warmack were explained in detail by him in his cost study (P.A. 47a-52a). Mr. Warmack stated that he had endeavored "to carry the costing to the refinements customarily required by the Federal Trade Commission in past Robinson-Patman cost cases" (P.A. 46a).

The Warmack cost study covers the cost of merchandising to Respondent's customers for the six months' period March 1, 1959 through August 31, 1959 and for the full fiscal year ending September 30, 1958 (P.A. 14a, 18a, 49a). Of special importance were the especially designed time records kept on a daily basis by salesmen and other personnel in making customer contacts during the 1959 period (P.A. 14a, 15a, 50a, 51a). These time records covered more than 14,000 contacts (P.A. 69a).

The cost study for the 1958 period was prepared at the request of the Commission's accountants and only after

the cost study for the 1959 period had been substantially completed. In connection with such request, Mr. Warmack was not asked to change any of the methods or practices adopted or followed in his preparation of the 1959 cost study, and he was only asked to show total sales of each different kind of appliance, rather than simply showing the total of laundry equipment in one group and all other appliances in another group (which was the form of the 1959 study) (P.A. 18a, 19a).

In his cost study (which term as herein used includes the cost study for the 1959 period and the 1958 period), Mr. Warmack carefully explained how the discounts to the merchandising distributors were justified by a lower cost of marketing AMC's products through such merchandising distributors (P.A. 44a-46a); he discussed the various functions which AMC personnel perform in serving regular dealers but which AMC personnel are not required to perform in serving merchandising distributors (P.A. 11a, 12a, 47a, 48a); and he set forth in great detail the actual cost savings to AMC in serving each of the merchandising distributors as compared to the costs in serving regular dealers, which cost savings substantially exceeded the discounts granted to such merchandising distributors (P.A. 16a, 17a, 46a, 55a).

Proceedings before Hearing Examiner, William A. Pack, commenced on May 3, 1960. Commission counsel introduced a Stipulation of Facts in which merchandising distributors were identified as a class of purchasers and the regular dealers were identified as a class of purchasers (P.A. 39a-41a). Mr. Warmack then testified in detail as to the preparation of the cost study and his conclusions. The cost study was introduced into evidence as AMC's Exhibit 1 (P.A. 10a-20a).

Following the testimony of Mr. Warmack, his cross-examination was deferred in order that Commission counsel and the Commission's accountants might have an opportunity to study the cost study, including the time records and the other underlying material upon which the cost study was based. Then, regrettably, Mr. Warmack died before the resumption of the hearings on November 29, 1960. Upon resumption of the hearings, Commission counsel waived cross-examination of Mr. Warmack "or any other witness in connection with the cost study" (P.A. 21a, 22a).

The Commission's principal witness was William S. Opdyke, an accountant with the Bureau of Investigation of the Commission. Mr. Opdyke was the Commission's expert witness. But neither Mr. Opdyke, nor any other witness for the Commission, testified that the customer classifications were improper or that any methods or procedures followed by Mr. Warmack were erroneous. Mr. Opdyke's testimony was summarized by the Hearing Examiner as follows (P.A. 68a, 69a).

> "Complaint Counsel's principal witness in opposition to the cost study was Mr. William S. Opdyke of the Commission's accounting staff. Mr. Opdyke's testimony was devoted almost entirely to pointing out instances of 'miscoding' in respondents' time study; that is, instances where on a salesman's report a dealer would be listed as a regular dealer, when in fact he was a merchandising distributor outlet, and vice versa.
>
> "Actually, there were relatively few instances of such miscodings . . . . Giving full effect to the miscodings, they reduce the cost differentials by only negligible amounts, a few one-hundredths of 1 percent."

In further support of the cost study and the customer classifications, Respondent called M. P. Wilson as a witness (P.A. 25a-36a). He was Manager of Sales Operations of the Kelvinator Division (P.A. 23a). He testified that the functions performed by salesmen in serving regular dealers "are required for all regular dealers" (P.A. 29a); that "many of them would not be required for a merchandising distributor" (P.A. 29a); and that there was a "fundamental difference" in the organizational make-up of a merchandising distributor and a regular dealer ("even where a regular dealer would be classified as a multiple outlet dealer") (P.A. 29a, 32a). His testimony on this "fundamental difference" can be summarized as follows:

> A merchandising distributor will employ in each of its zone or branch offices qualified appliance personnel who devote the majority of their time to the merchandising and selling of appliances. Such personnel devote considerable attention to the merchandising distributor outlets. Training of personnel in the merchandising distributor outlets, both in appliance products and in the sale and promotion of such products, is largely done by regional and zone personnel of the merchandising distributor. Further, a merchandising distributor will hold meetings for its outlets for the purpose of carrying out programs suggested by AMC (P.A. 26a-28a). On the other hand, the regular dealers, including those with multiple outlets, do not have personnel who perform the functions performed by AMC's district managers and by similar personnel of the merchandising distributors (P.A. 29a).

Also, Mr. Wilson testified, in connection with his testimony relating to his visits to merchandising distributors, as follows (P.A. 35a):

> "That is one of my responsibilities, to assure myself that these merchandising distributors are still performing and doing the functions for which they were established as such."

Regarding Mr. Wilson's testimony, the Hearing Examiner stated (P.A. 70a):

> "His testimony supports that of Mr. William J. Warmack, especially on the vital point of classification of customers and the factors accounting for the classification."

In considering the vital cost determining factors, the Hearing Examiner stated (P.A. 64a):

> "Essentially, the validity of respondents' cost study turns on the question whether in selling to regular dealers respondents' employees usually perform certain significant functions which ordinarily they are not called upon to perform for merchandising distributors."

The Hearing Examiner then concluded (70a, 71a):

> "There is, in fact, no substantial evidence in opposition to the cost study . . .
>
> "In summary, we have here a case in which the price differential is relatively small—3.5 percent—which is much smaller than the differentials which have usually been involved in other cases before the Commission. We have a cost study prepared by a very competent accountant with broad background and experience in Robinson-Patman Act cases. *The classification of customers appears logical and reasonable and is supported by substantial evidence. Unquestionably there are substantial differences in the cost to respondents of serving the two groups.* While there are discrepancies in the cost study, they are of a minor nature and do not materially affect the results reached by the study.

> The hearing examiner sees no reason to question the integrity of the cost study or its essential accuracy.
>
> "Cost justification, of course, is an affirmative defense and the burden of establishing the defense rests upon the party who offers it. But this burden should not be made excessive or unreasonable. Otherwise, the practical effect is to nullify the defense.
>
> . . .
>
> "It is concluded that here the burden has been sustained." (Emphasis supplied.)

The reversal of the Hearing Examiner by the Commission, and the unwarranted and unfounded conjectures and suppositions of the Commission in doing so, are discussed in the Argument section of this brief.

In reversing the Commission, the Court of Appeals for the Sixth Circuit stated:

> "We share the view of the Commission's hearing examiner that American Motors met its burden . . . (App. 23).
>
> ". . . It (American Motors) made out its case and we consider that FTC applied impermissible standards in attacking it" (App. 40).

As is more fully discussed elsewhere in the Argument section of this brief, the Sixth Circuit discussed *United States v. Borden,* 370 U.S. 460 (1962), at length, concluding that the Commission had improperly interpreted the principles of *Borden* (App. 36-39), that the Warmack cost study and related testimony were clearly distinguishable from the proofs of cost justification relied upon by the defendants in the *Borden* case (App. 33-36), and that the evidence introduced by AMC clearly established the necessary "self-sameness" or "homogeneity" among the regular dealers (App. 27-30).

ARGUMENT

I.

IN REQUESTING CERTIORARI, PETITIONER URGES UPON THIS COURT A CONFLICT WHICH, IN FACT, DOES NOT EXIST.

In an attempt to establish grounds for certiorari under Supreme Court Rule 19, Petitioner argues that the opinion below is in conflict with this Court's opinion in *United States v. Borden Co.*, 370 U.S. 460 (1962). More specifically, Petitioner asserts that the Sixth Circuit opinion amounts to the approval of a cost justification defense suffering from the same defects which led to the rejection of such defenses in *Borden*.

Petitioner's position, however, is untenable. Analysis of the record in this case and the opinion of the Court below, in juxtaposition with the *Borden* opinion, shows that the Sixth Circuit decision favoring Respondent contained a proper application of the *Borden* principles.

Petitioner's misconception of the *Borden* case is evident in the section of its petition titled "Questions Presented." There, the Petitioner, erroneously and stubbornly, again refuses to recognize the *Borden* principle of permitting costs to be averaged when there is a close resemblance of the individual members of each group "on the essential point or points which determine the costs considered," and instead insists upon a demonstration that "the cost of serving the disfavored customers was substantially similar for all of them." This approach by the Petitioner is completely contrary to the letter and spirit of the *Borden* opinion.

In *Borden* this Court stated (p. 468) that to renounce "class pricing as justified by class accounting would be to eliminate in practical effect the cost justification proviso as to sellers having a large number of purchasers" and that such a result would be "at war with Congress' language and purpose." Then, after pointing out (pp. 468-469) that price differentials could not be justified on the basis of "arbitrary classifications" or classifications based simply "on a numerical majority of the indivivdual members," this Court articulated the fundamental test by which a cost defense should be judged in the following language (p. 469):

> "A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. High on the list of 'musts' in the use of the average cost of customer groupings under the proviso of §2(a) is a close resemblance of the individual members of each group *on the essential point or points which determine the costs considered.*" (Emphasis supplied.)

Thus, the task of the Court below, as stated by this Court in *Borden,* was the searching of the record for evidence bearing on the question of "selfsameness," such "selfsameness" to be determined by an inquiry as to whether the regular dealers resembled one another "on the essential point or points which determine the costs considered"—and not, as Petitioner states, by an inquiry as to whether the cost of serving such regular dealers "was substantially similar for all of them."

In seeking review here, the Petitioner reads into this Court's opinion in *Borden,* an element that is not there. The Government's position clearly is that Respondent was

not entitled to average the costs of dealing with regular dealers even though there was a close resemblance of the regular dealers "on the essential point or points which determine the costs considered." This position is, of course, clearly contrary to the legal principles enunciated by this Court in *Borden* as set forth above. Petitioner's real complaint, therefore, is with the *Borden* opinion itself, rather than the case at bar.

Respondent submits that Petitioner's interpretation and proposed application of *Borden* is incorrect and that the Sixth Circuit's approach was completely consistent with *Borden*. In its opinion (App. 37-40), the Sixth Circuit dealt perceptively with Petitioners' continuing misconception about *Borden*, commenting as follows:

> "The FTC asks, and we have indulged, generous inferences to support its prima facie case of violation. We fear that they ask us to employ a different and narrower standard in judging the appellant's proofs . . .
>
> "But here the Commission seems to be reverting to its former, harder policy referred to in the *Borden* opinion . . . We consider that the Commission here is saying that in an enterprise of the size of American Motors, it is virtually impossible to establish a cost justification it will accept."

Also, the Court below pointed out that the present Commission had disregarded the principles enunciated by a prior Commission in *Minneapolis-Honeywell Regulator Co.*, 44 FTC 351, where the Commission stated (App. 38-39):

> "Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them

> a reasonable margin of allowable error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight. Respondent had an extensive cost study made by an independent firm of accountants and auditors which disclosed cost justification for the price differentials resulting only from brackets 1 through 3A. It apparently was made with considerable care and great particularity of detail. Although basic questions may properly be raised with respect to the soundness of certain of the procedures and allocations upon which the cost differentials were determined, respondent's effort represents a fair and objective study of the problem which was probably done as well as it could be done under the circumstances. Respondent's burden under the Act is very great and it should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive efforts to discharge that burden. We have accordingly accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error."

The Court of Appeals understood the unrealistic and unreasonable burden which the Petitioner sought to impose upon Respondent, and recognized that the imposition of such a burden would be inconsistent with the *Borden* case. It correctly regarded its factual inquiry as one focusing upon the question of similarity as to the essential cost-determining points, rather than on the individual, actual costs incurred in serving the various regular dealers.

Apart from showing a misconception as to the fundamental nature of the inquiry contemplated by *Borden*, the Petitioner erroneously contends that the Respondent's cost study suffers from the very same defects which led to the downfall of the Borden-Bowman studies in the *Borden*

case. In other words, the Government is contending that the Sixth Circuit opinion is in conflict with *Borden* since the Respondent's cost study and facts surrounding it are allegedly identical to the Borden and Bowman cost studies and facts relating to them. This contention is obviously without any foundation whatsoever.

A study of the *Borden* case, and of the record here, shows that the Respondent's cost study, and the evidence in the record relating to it, are both dramatically different from the studies and the evidence before this Court in *Borden*. The Court of Appeals' opinion contains a careful discussion of the important differences between the Respondent's factual presentation and the presentation made on behalf of the Borden and Bowman dairies in the *Borden* case (App. 33-36). Clearly, the Court of Appeals would have reached the same conclusion with the Borden and Bowman cost studies as was reached by this Court. On account of the many distinctions, however, between the Respondent's cost study (and the evidence relating to it) and the Borden and Bowman cost studies (and the evidence relating to them), the Court below concluded that the Respondent's customer classifications complied with the *Borden* requirement of "selfsameness."

On pages 11-12 of its petition, the Petitioner criticizes the Respondent's cost study because the regular dealers included customers "having disparate volumes," and the Petitioner then quotes from *Borden as* follows:

> ". . . 'such a grouping for cost justification purposes, composed as it is of some (disfavored) independents having volumes comparable to, and in some cases larger than, that of the (favored) chain stores created artificial disparities between' disfavored customers and the favored one. 370 U.S. at 469-70."

Thus, in quoting this language from *Borden*, where the discounts were based principally on sales volumes, the Petitioner is attempting to infer that the Respondent's discounts were based on sales volumes, which the Petitioner knows is not true.

A summary of the Borden and Bowman discounts appears in footnote 4 of this Court's opinion in *Borden*. As is obvious from footnote 4, and as this Court noted at page 464 of its decision, the discounts in *Borden* were primarily based on volume. At page 467 of its opinion, this Court observed that the trial court had noted the "seemingly arbitrary" nature of a classification resulting in "percentage discounts which do not bear a direct ratio to differences in volume of sales." In his concurring opinion (at page 472) Justice Douglas observed that one of the cost factors intrinsic to the Borden and Bowman studies was the "volume of sales." Thus, since the evidence in *Borden* showed certain disfavored customers with volumes greater than the volumes of certain favored customers, and since sales volume clearly was "the essential point" which determined the costs considered, the customer classifications were properly found to be defective.

In this case, however, volume is not, and has never been considered as, a cost determining point. To the contrary, the essential cost determining point, relied upon in the Warmack cost study and by the Respondent throughout this proceeding is that in selling to regular dealers Respondent's employees perform certain significant functions which they are not called upon to perform for merchandising distributors. As both Mr. Warmack and Mr. Wilson testified, this results from a "fundamental difference" in the organizational make-up of merchandising distributors and regular dealers, namely, that merchandising

distributors maintain sales staffs for performing, at their expense, the functions which AMC must perform, at AMC's expense, for the regular dealers (since the regular dealers, including those with multiple outlets, do not maintain such sales staffs).

The Court of Appeals, in considering the Petitioner's argument, fully understood such "fundamental difference." In its opinion (App. 28-30), the Court below distinguished this case from the situation in *Borden* where volume of sales was a cost determining point, stating as follows:

> "Dealing with the first attack, we do not consider that the fact that some of the regular dealers enjoyed as much or more sales volume as the merchandising distributors, that some were single appliance stores and others had multiple outlets, and that some were located in large department stores, destroys the validity of their being classified together for the purpose of cost justification. The needed homogeneity is not dependent upon the size or style of doing business, provided American Motors' method of using them to market its products exposed it to the 'selfsameness' and uniformity in its burden of costs. *The evidence disclosed that the merchandising distributors supplied for themselves a sales staff which carried on at their own expense the functions which American Motors had to perform, at its expense, for the regular dealers* . . .
>
> . . . . .
>
> "The homogeneity required in this regard does not lie in the size or style of the regular dealers but in the uniformity and 'selfsameness' of American Motors' cost of doing business with them." (Emphasis supplied.)

On page 11 of its petition, the Petitioner also seeks to attack the Respondent's customer classifications by making

the unwarranted and unfounded statement that "There can be no serious dispute with the Commission's finding. . . . that AMC has thereby included within the disfavored class department stores and others who probably are no more expensive to service than the four favored customers." However, this finding (which is conjectural on its face) is based on the Commission's Findings of Fact, Nos. 44, 45 and 46 (P.A. 87a, 88a), and these Findings of Fact were found by the Court below, after its exhaustive search of the record, to be "clearly erroneous" (App. 32).

In summary, the Petitioner would have this Court believe that the Sixth Circuit misconceived the lessons of Borden, and further that the underlying facts here are no different from the facts which presented themselves in *Borden.* To the contrary, the Sixth Circuit properly interpreted and applied the letter and spirit of *Borden,* and a thoughtful analysis of the Sixth Circuit's opinion, and the record on which it was based, shows the fundamental facts here to be substantially different from those involved in *Borden.* Clearly, then, there is no conflict between the Court of Appeals' opinion in the present case and this Court's earlier opinion in *Borden.* This being so, certiorari should not be granted as requested by Petitioner.

II.

IN REQUESTING CERTIORARI, THE PETITIONER IMPROPERLY URGES THIS COURT TO REEXAMINE THE EVIDENCE BELOW UPON WHICH THE COURT OF APPEALS BASED ITS ULTIMATE FACTUAL CONCLUSIONS.

It is clear that the Court of Appeals, in its scrutiny of the record presented, was aware of and applied the test articulated in *Borden*. It inquired as to "selfsameness" among the regular dealer group on the basis of the presence or absence of similarity as to the essential cost determining points. This record consisted of the cost study itself, the testimony taken before the hearing examiner, the exhibits introduced, the hearing examiner's opinion, and the opinion of the Commission itself. Having exhaustively studied the evidence presented on behalf of both parties and having considered the inferences to be drawn therefrom it reached its ultimate factual conclusion—that the regular dealer group members did have sufficient 'selfsameness" to be treated together for cost justification purposes. Petitioner asks this Court to study the entire record again and to answer again the ultimate factual question which was decided below.

In its request for certiorari, Petitioner takes the position that the significant facts relating to the cost justification defense are the same here as they were in *Borden*. Respondent has shown that this is not so. In disposing of the case before it, the Court below simply accepted the applicable legal principles established by this Court in *Borden* and applied them to the particular record existing in the case. In finding for the Respondent on the factual questions of selfsameness and substantial similarity as to the essential cost determining points, the Court of Appeals' opinion was completely in harmony with the result

reached by the Hearing Examiner—before whom all the evidence herein was originally presented. Pertinent factual conclusions of the Hearing Examiner and the Court of Appeals are summarized in Respondent's Statement.

This Court has stated often that it does not grant certiorari to review a lower court's decision which turns solely on an analysis of the particular facts involved. This is precisely what the Government now asks this Court to do, and accordingly certiorari should not be granted.

III.

IN REQUESTING CERTIORARI, THE PETITIONER ERRONEOUSLY HAS TAKEN THE POSITION THAT THE COURT OF APPEALS' OPINION IS OF SPECIAL IMPORTANCE AS REGARDS THE ADMINISTRATION OF THE ROBINSON-PATMAN ACT.

As a corollary of its theory that the Court of Appeals' opinion conflicts with *Borden*, Petitioner states that unless certiorari is granted, litigation will result which should have been put to rest by *Borden*. Further, the Petitioner states that litigants will "channel" cases to the Sixth Circuit and that the administration of the Robinson-Patman Act will be adversely affected by the decision below. In this connection, the Petitioner, without regard to the significant differences in Respondent's cost study and the cost studies in the *Borden* case, has attempted to create the impression that if this Court does not make the same exhaustive and painstaking review of the record made by the Sixth Circuit, the Sixth Circuit will approve other cost studies in disregard of the *Borden* case. This argument is obviously without merit, since it is based on the erroneous assumption that the Sixth Circuit's factual conclusions were incorrect.

The Respondent's cost study was only a part of the entire record below, all of which was considered by the Sixth Circuit in its inquiry as to "selfsameness." In addition to the cost study itself, impressive and detailed as it is, the record below includes: the examination of its preparer, Mr. Warmack; Mr. Warmack's correspondence relating to the study; the examination of witnesses presented by both parties; a stipulation of facts; certain documentary evidence; the lengthy findings and decision of the Hearing Examiner (filed September 3, 1964) and the findings and decision of the FTC (filed July 19, 1965).

Respondent submits that a reading of the opinion below compels the conclusion that this present case is not certworthy. In Respondent's view, the opinion below is unusual in its careful and complete treatment and consideration of the entire record available to it. The Court below pointedly considered and discussed those parts of the record which it viewed as being most helpful to the Petitioner's argument against the Respondent's customer classification. The Court observed (App. 26) that the Commission's evidence as to discrepancies in the cost study were "so minimal as in no way to impair" its conclusions. Neither the Commission's accountant, William S. Opdyke, nor any other witness for the Commission, expressed any opinion that the customer classifications in the Respondent's study were improper. Nor was there any other testimony in the record which disputed the testimony supporting Respondent's classification of customers. Throughout this case, Petitioner's argument as to the invalidity of the "regular dealer" grouping has been primarily based upon conjectures and inferences that it has attempted to draw from the testimony of one M. P. Wilson. This particular testimony was considered and commented upon by the Sixth Circuit in its opinion below (App. 30-32). This testimony, regarded by the Court below as constituting the

"strongest support for FTC's attack", was found by the Court to indicate only inevitable departures from absolute uniformity and not to affect its ultimate factual conclusion as to "selfsameness" based upon the essential cost determining points.

In summary, on the ultimate factual question presented for consideration, the Court below found a record which, in its view, included substantial evidence establishing the necessary "selfsameness" and wholly insufficient evidence tending to contradict it. As the Court below observed in footnote 8 (App. 39), there were no objections to the Respondent's customer classification during the earlier stages of this protracted litigation. In fact, as footnote 8 points out, the Court below noted that during his preparatory work, Mr. Warmack consulted with the Commission "to assure that his study conformed with acceptable practices and was never told that it did not"; that such assertion had never been challenged; and that the Commission's only response to such assertion was the following statement in its brief:

> "No principle of equitable estoppel bars it (the Commission) from the performance of its duty because of mistaken action by its subordinates."

However the Commission may regard the relationship between equity and its "duty", there is no way that its after-the-fact taking of a legal position could fill out the scanty Commission position established in the record upon which this case has been and must be decided. When the Hearing Examiner rendered his opinion favorable to the Respondent in 1964, he stated, "There is, in fact, no substantial evidence in opposition to the cost study" (P.A. 70a), and that "The classification of customers appears logical and reasonable and is supported by substantial evidence" (P.A. 71a). The Sixth Circuit, having exhaustively

studied the record again, obviously agreed with the Hearing Examiner's assessment of the evidence which exists in this case.

Thus, this case is not one of any general applicability; nor does it provide any format for cost studies which can circumvent *Borden* and thwart the administration of the Robinson-Patman Act. Instead, it is a decision based upon a certain record—a record completely lacking in any evidential support for the legal argument now being advanced on behalf of the Commission. The Sixth Circuit below did all that it could do—it applied the *Borden* principles to the record before it. Any new cost justification case which may go to the Sixth Circuit will be subject to the same searching assessment of the record which was undertaken in the present case involving Respondent. The idea that the Sixth Circuit has now taken a position in conflict with *Borden* and, therefore adverse to the administration of the Robinson-Patman Act, is wholly groundless.

CONCLUSION

For the reasons discussed above, Respondent submits that this Court should not grant the writ of certiorari requested by the Petitioner.

Respectfully submitted,

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